No. 91-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus Curiae Video Software Dealers Association in this brief addresses the following question:

Whether the First Amendment prohibits the government from confiscating a private enterprise's entire inventory of expressive works because of a determination that a negligible fraction of that inventory was obscene.

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Amicus curiae Video Software Dealers Association, with the written consent of all parties, submits this brief in support of petitioner Ferris J. Alexander, Sr.

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

Amicus curiae Video Software Dealers Association ("VSDA") is a national association of dealers and distributors of recorded video programming that is replayed and viewed in private homes. The association

has over 3,000 regular members, representing close to 20,000 of the approximately 28,000 retail video outlets in the United States. Associate members of VSDA include the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

VSDA is aware that a group of *amici curiae* consisting of a broadly-based media coalition intends to submit a brief in support of petitioner in this case, and VSDA generally subscribes to the arguments of that group. Like the members of that group, VSDA maintains that the drastic forfeiture provisions of 18 U.S.C. § 1963 (the "RICO forfeiture law") are an unconstitutional form of sanction for the obscenity violations in this case. VSDA, however, submits this brief to stress, from the typical video dealer's point of view, the critical differences that distinguish those provisions from other kinds of criminal sanctions for obscenity.

Forfeiture under 18 U.S.C. § 1963 has an impact upon the distribution of video cassettes that differs, in a constitutionally significant way, from the effect of other sanctions employed in obscenity cases. As the Court has recognized, the inherent uncertainty in the definition of obscenity means that any sanction for obscenity will inhibit the distribution of erotic works that are not obscene, works that are fully protected under the First Amendment. And there is no question but that the more severe the sanction the greater the inhibition.

The RICO forfeiture law, however, does more than inhibit. Whenever applied to the owner of an establishment that sells works of expression, that law physically stops the distribution of all works—without regard to their status under the First Amendment—in the inventory of every store in the owner's "enterprise."

Even were the RICO forfeiture law never applied, the mere threat that it might be invoked for offenses predicated upon obscenity violations interferes with the distribution of protected erotica in two ways. First, it pressures the typical video dealer to refuse to carry films that have a sexual orientation—which typically constitute a minor fraction of the dealer's inventory—in order to protect his entire inventory from forfeiture. Second, for those few who resist that pressure, the RICO forfeiture law gives dealers who carry a broad line of films powerful incentive to segregate erotic works—whether or not obscene—and to offer them through a separate enterprise in order to reduce the risk of a RICO forfeiture of their entire video cassette business.

Application of the RICO forfeiture law in obscenity cases thus tends to remove from the shelves of broadline video outlets, which represent the vast majority of the nation's video stores, protected works of expression that have erotic or sexual content. These dealers are induced either to carry no such works or, if feasible, to establish dual systems of distribution in which these protected works are offered solely in stores that specialize in sexually oriented material. This tendency to confine the distribution of expressive works to special and fewer retail outlets renders application of the RICO forfeiture law in obscenity cases inconsistent with the First Amendment.

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the Constitution of the United States reads, in pertinent part, as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Section 1961 of Title 18 of the United States Code reads, in pertinent part, as follows:

> As used in this chapter—
>
> (1) "racketeering activity" means (A) any act or threat involving . . . dealing in obscene matter . . . or (B) any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter); . . .
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . .
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Section 1962 of Title 18 of the United States Code reads, in pertinent part, as follows:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1963 of Title 18 of the United States Code reads, in pertinent part, as follows:

> (a) Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective or any provision of State law—
>
> (1) any interest the person has acquired or maintained in violation of Section 1962;

(2) any —
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of Section 1962.

STATEMENT

Petitioner Ferris J. Alexander, Sr. ("Alexander") owned and operated a chain of establishments in the Minneapolis area that included several retail outlets for video cassettes. His entire enterprise—a business comprising theater operations, wholesale distribution centers for books, magazines and video cassettes and retail stores for these products—was engaged primarily in the dissemination of erotic materials.[1]

In May 1989, the federal government indicted Alexander for obscenity, RICO and tax violations. The RICO charges were predicated upon 34 alleged obscenity violations, all of which were based upon sales of five magazines and seven video cassettes. He was

[1] Alexander describes the materials as "officially-disfavored, albeit First-Amendment-protected, speech." Petition for a Writ of Certiorari, filed March 16, 1992, at p. 3.

convicted, *inter alia*, of 18 of the 34 obscenity charges and 3 RICO offenses. Only seven of the twelve allegedly obscene items were found obscene. Under 18 U.S.C. § 1963, however, his conviction for the RICO offenses mandated forfeiture of his entire enterprise, including "over *one hundred thousand* unlitigated, presumptively protected books, magazines, and videotapes." Petition for Writ of Certiorari, filed March 16, 1992, at p. 7 (emphasis added).

The concentration of Alexander's business in the sale and distribution of erotic material is not typical of retail video outlets in the United States. The retail level of the video cassette industry, for the most part, consists of stores that offer a broad line of video products, only a fraction of which are erotic or "adult" films.[2] Video dealers typically do not specialize in sexually explicit films or any other category of films available. Rather, they choose films for their inventory from over 17,000 titles available and stock a broad line of films that they believe will be of interest in their local market area. According to a 1986 VSDA annual survey of a representative group of VSDA members, approximately 77 percent of its members

[2] Classification of a film as "adult" by no means is equivalent to saying that the film is obscene. Most "adult" films do not satisfy the standards for obscenity laid down in *Miller v. California*, 413 U.S. 15 (1973) in any community.

Films ordinarily are classified as "adult" films by producers, who largely rely upon subjective assessments of the level of any sexual content the film has. The Motion Picture Association of America does not rate all films, and there is no formal rating system for "adult" films. Many films other than "adult" films have sexual orientations.

carry "adult" films, which typically comprise about 13 per cent of their inventory.

ARGUMENT

THE RICO FORFEITURE LAW AS APPLIED IN THIS CASE IS AN UNCONSTITUTIONAL FORM OF SANCTION FOR OFFENSES PREDICATED UPON VIOLATIONS OF THE OBSCENITY LAWS

The RICO forfeiture law, as applied in this case, is a great deal more than a severe punishment for obscenity violations. Unlike a heavy fine or a long prison term, the forfeiture in this case is governmental action that directly stopped dissemination of over 100,000 existing works of expression—works that have not been found obscene or even sexually explicit. Neither fine nor prison term constitutes that kind of restraint.

In fact, the forfeiture in this case is a classic prior restraint. The works in Alexander's inventory have been seized by the government before any determination of their status under the First Amendment—governmental action that repeatedly has been condemned as a prior restraint. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66-67 (1989); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-317 (1980); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

The fact that the restraint in this case takes the form of a seizure of expressive works to sanction the unlawful distribution of other works is no reason to hold the prior restraint doctrine inapplicable. *Compare Adult Video Association v. Barr*, 960 F.2d 781, 788-790 (9th Cir. 1992). As the decision in *Marcus v.*

Search Warrant, supra, illustrates, the unconstitutionality of governmental seizures of expressive works lies in the fact that such works are presumptively protected under the First Amendment. Thus, any seizure of works that have not been adjudged obscene or otherwise unprotected runs afoul of the First Amendment.

In *Marcus*, the Court reviewed a government seizure of publications pursuant to a search warrant issued upon probable cause "to believe that obscene material 'is being held or kept in any place or in any building.'" *Marcus v. Search Warrant*, 367 U.S. at 719. The Court held that seizure unconstitutional after a review of some of the history leading to the First Amendment. As the Court observed—

> The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. . . .

Id. at 724.

After recounting some of the critical conflicts in that struggle, the Court held that the procedures "as applied in [*Marcus*] lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled." *Id.* at 731. Because of this constitutional infirmity, "there were suppressed and withheld from the market for over two months 180 publications" that had not been found obscene by the lower courts in *Marcus*.

The RICO forfeiture in the instant case, like the seizure in *Marcus*, was accomplished under a statutory scheme that provides no safeguards to assure that protected works avoid seizure. On the contrary, the RICO statute compels automatic forfeiture of "any interest [held by an offender] in . . . any enterprise which the [offender] has established, operated, controlled, conducted, or participated in the conduct of, in violation of [18 U.S.C. § 1962]." Where, as in the instant case, the offender owns an enterprise that is found to have sold or rented obscene works, the entire enterprise is forfeited, including its inventory of presumptively protected works. The RICO forfeiture law thus not only lacks procedures to prevent the seizure of protected works, it virtually requires seizure of such works—and, what is worse, the law provides no means by which the owner can compel the return of his or her protected works.[3]

Beyond direct curtailment of the offender's freedom to sell protected works, however, the RICO forfeiture law constitutes an indirect restraint that raises First Amendment concerns of no less gravity. On several occasions in the past, the Court has pointed to the danger that obscenity laws and other governmental rules affecting expression engender a system of "self-censorship"—that is, a system in which persons refrain from publishing protected expression or alter their decisions about expressive activity rather than take the risk that they might subsequently be challenged by the government. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964); *Smith v. California*, 361 U.S. 147 (1959).

[3] Thus, in the instant case, Alexander's entire inventory was destroyed.

This indirect influence upon the exercise of First Amendment freedoms—referred to as a "chilling effect"—has often been the principal reason for First Amendment scrutiny. *See, e.g., Minneapolis Star and Tribune Co. v. Minneapolis Commissioner of Revenue*, 460 U.S. 575, 585 (1983); *Talley v. California*, 362 U.S. 60 (1960). "[I]nhibition as well as prohibition against the exercise of precious First amendment rights is a power denied to government." *Lamont v. Postmaster General of the United States*, 281 U.S. 301, 309 (1965) (Brennan, J., concurring).

Threat of fine or imprisonment undoubtedly induces many video dealers to reject not only obscene videos, but also protected videos with sexual content. Dealers tend rightly to believe that videos with sexual content have the highest probability of being challenged as obscene. The RICO forfeiture law dramatically increases that chilling effect.

In addition to the chilling effect inherent in any sanction for obscenity, however, application of the RICO forfeiture law in obscenity cases has another unconstitutional consequence. For those dealers who can withstand the "chill," the law creates a strong incentive for them to establish a separate "enterprise" for videos with a sexual orientation.[4] By establishing a separate enterprise, a dealer can limit its exposure to a RICO forfeiture of the inventory and assets of the enterprise featuring films with sexual

[4] The term "enterprise" is defined in RICO forfeiture law to include any "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961.

content while protecting the remainder of its operations.

Such governmentally-induced segregation of protected works poses serious First Amendment concerns. It deprives the public of access to a free market in constitutionally protected material. Many customers frequent a video store without a clear idea of the specific film they wish to rent. They examine the titles available to find movies that strike their fancy. Customers of broadline video stores can select from a variety of films that is determined only by choices made by individual dealers. The available films generally include films with and films without substantial sexual content.

If video dealers are forced by fear of the draconian sanctions of the RICO forfeiture law to segregate their wares, customer options will be diminished by virtue of a government threat. *Compare, Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). And, while sexually- explicit materials may be available in stores specializing in those materials, customers often are reluctant to patronize such stores, even if the store avoids carrying obscene films. Thus, the RICO forfeiture law burdens the public's ability to select the material it wishes to watch—or read or listen to—and producers, distributors and dealers wish to provide. That burden cannot be justified under the First Amendment. *Cf. Lamont v. Postmaster General*, 381 U.S. 301 (1965).

The RICO forfeiture law, moreover, interferes with the video dealers expressive rights. Video dealers exercise these rights not only in the selection of the films for inventory, but also by such choices as the arrangement of the films in the store, the manner in

which the films are promoted and the setting in which the dealer offers those films. These decisions are the "editorial" decisions of the video dealer, analogous to decisions made by newspaper and magazine editors, bookstore owners and publishers concerning the content of the expression they choose to communicate. It is well established that this editorial judgment is fully protected by the First Amendment. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Because of its tendency to confine the distribution of constitutionally protected expression to a limited number of specialized outlets and its overall chilling effect on dealers' exercise of their First Amendment rights, application of the RICO forfeiture law for offenses predicated upon obscenity violations must be tested under First Amendment standards. Since the applicability of these sanctions turns on the content of the expressive works, the constitutionality of the forfeiture provision must be tested by the standards employed to test statutes that discriminate on the basis of the content of the message. Thus, the government must justify the law as necessary to serve a compelling government interest and narrowly drawn to achieve that end. *Simon & Shuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501, 116 L.ed.2d 476 (1992).

However, even if that standard is deemed not applicable, application of the RICO forfeiture provisions in obscenity cases must satisfy the First Amendment test prescribed for content-neutral regulation. Under that test, restraints imposed by the RICO forfeiture law could be upheld only if the government establishes that they are "no greater than is necessary to the

furtherance of [an important or substantial governmental interest]." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

Neither constitutional test can be met in the instant case. Presumably the interest that the government seeks to further is the eradication of obscene expression from American society.[5] It hardly is self-evident, however, that that interest is compelling or that forfeiture of vast quantities of protected works is even reasonably designed—much less essential—to further any governmental interest in combatting obscenity. In order to sustain the RICO forfeiture provisions, the government must show that traditional criminal sanctions—or even a narrower seizure of works that previously have been found obscene—are insufficient to accomplish its legitimate purposes. It has not met and cannot meet that burden in this case. The RICO forfeiture law is not essential to further a sufficiently compelling interest and cannot constitutionally be applied in the manner it was applied in the instant case.

[5] If the government's interest is to suppress any broader category of sexual expression, the RICO forfeiture law would fail as the instrumentality of an unconstitutional program.

CONCLUSION

For the reasons stated herein, the judgment of the court below should be reversed.

Respectfully submitted,
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